Supreme Court, U.S.
FILED
JUN 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1471

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LAURIE WALKER,

Petitioner,

v.

SUPERIOR COURT OF SACRAMENTO COUNTY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITIONER'S REPLY TO THE ATTORNEY GENERAL'S RESPONSE IN OPPOSITION

LAURENCE H. TRIBE
Counsel of Record
KENNETH J. CHESEBRO
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

Of Counsel:

THOMAS A. VOLK
ROBERT G. SCOFIELD
1721 Second Street
Sacramento, California

June 6, 1989

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

TABLE OF AUTHORITIES

Cases:

Chambers v. *Mississippi*, 410 U.S. 284 (1973) 4

Commonwealth v. *Twitchell* (Massachusetts — Suffolk Superior Court, Nos. 069517 & 069757) (pending) 2

Corporation of the Presiding Bishop v. *Amos*, 107 S. Ct. 2862 (1987) 8

Frost v. *Railroad Comm'n*, 271 U.S. 583 (1926) ... 4

People v. *Arnold*, 58 Calif. Rptr. 115 (1967) 5, 6

People v. *Parker*, San Bernardino County Superior Court No. CR 29566, appeal abandoned, 4 Crim. No. 7210 6

Prince v. *Massachusetts*, 321 U.S. 158 (1944) 7

Simmons v. *United States*, 390 U.S. 377 (1968) 4

State v. *Hermanson* (Florida — Sarasota County Superior Court, 12th Judicial District, Nos. 86-3231-CF-A-N1 & 86-3231-CF-A-N1) (pending) 2

State v. *King* (Arizona — Maricopa County Superior Court, No. CR 88-07284) (pending) 2

United States v. *Ballard*, 322 U.S. 78 (1944) ..... *passim*

Washington v. *Texas*, 388 U.S. 14 (1967) 4

Constitutional Provisions and Statutes:

United States Constitution

First Amendment ..... *passim*

Fourteenth Amendment ..... *passim*

TABLE OF AUTHORITIES (cont.)

California Penal Code § 192(b) ..... *passim*
§ 270 ..... *passim*
§ 273a(1) ..... *passim*

PETITIONER'S REPLY TO THE ATTORNEY GENERAL'S RESPONSE IN OPPOSITION

The petition explained why this case is of great importance in defining how the states may operate within the broad zone of "permissible accommodation" — what standards are to govern when a state chooses neither to make religious belief altogether irrelevant to civil or criminal liability, nor to accommodate such belief by fully exempting those who pursue its dictates in good faith. The question potentially posed in all such situations is whether states may hedge their bets by electing a form of "quasi-accommodation" — whether they may enact laws (like the 1976 amendment to California's child neglect statute) which *appear* to accommodate religious beliefs by inviting people to adhere to those beliefs free of liability in certain situations, but which are later *construed* to permit the conviction of adherents who are judged to have carried their beliefs too far, based on an assessment by prosecuting officials and jurors that continued adherence to those beliefs became "unreasonable" as the situations those adherents confronted became increasingly dire.

The Attorney General's opposing brief essentially concedes that such trials of faith are barred by the First Amendment as interpreted in *United States* v. *Ballard*, 322 U.S. 78 (1944). It concedes, further, that the state's statutory regime gives defendants "reason to inject [their] religion at trial" (Opp. 8), inasmuch as § 270 itself, ever since 1976, has described "treatment by spiritual means through prayer alone" as suitable "remedial care" for an ailing child.

A number of other states are now considering the issue posed by the decision below — the issue of how to proceed in the face of a state's offer to spare religiously motivated individuals if juries choose to side with them when they "seek to place [their] faith on trial" (Opp. 8) in response to that

offer.[1] At least one other state court has adopted the analysis of the California Supreme Court in upholding state power to put religiously motivated defendants to this choice.[2] Nor does the Attorney General deny the observation (Pet. 22-23) that another state's judiciary has recently taken a position conflicting with the court below. Certiorari is accordingly in order to resolve this conflict and to prevent continued erosion of the *Ballard* principle.

1. In response to the argument that the statutory regime promulgated by the California legislature impermissibly confronts Laurie Walker with a jury trial on the reasonableness of her religious beliefs, the Attorney General's simple refrain is: it's all her fault. The Attorney General observes that, because her "religion is not an element of the offenses" with which she is charged, "her religious convictions plainly constitute no part of the State's case." (Opp. 8.) He says that, because the State is not *required* to accommodate her religious beliefs in the application of its child-protection statutes, "the reasonableness — and, indirectly, the verity — of petitioner's belief in the healing efficacy of prayer [is] *irrelevant* to her responsibility under the law." (Rep. 8. (emphasis in original).) He concedes that, under California's law, "[p]etitioner may seek to place her faith on trial, in hope of jury leniency or nullification." (Pet. 8.) But he says that, if she did, "she would be estopped from asserting a violation of the Free Exercise Clause" — the trial of faith she would undergo would be simply "a consequence of her own conduct, not state action." (Opp. 9.)

---

[1] *See, e.g., State* v. *Hermanson* (Florida — Sarasota County Superior Court, 12th Judicial District, Nos. 86-3231-CF-A-N1 & 86-3231-CF-A-N1); *Commonwealth* v. *Twitchell* (Massachusetts — Suffolk Superior Court, Nos. 069517 & 069757); *State* v. *King* (Arizona — Maricopa County Superior Court, No. CR 88-07284).

[2] *State* v. *King, supra* note 1, Order Denying Motion to Dismiss, March 3, 1989.

But, as the California Supreme Court noted in the decision below, the Attorney General's own argument in that court urged permitting the petitioner to introduce evidence of her faith in proving her "reasonable reliance" on her construction of § 270. (*See* Pet. App. A37 n. 18.) Whether that rubric is accepted or rejected, petitioner's religious beliefs are indisputably relevant to whether she can be convicted of felony child endangerment or involuntary manslaughter. For, as the court below concluded, in passing its 1976 amendment to § 270's specification of the care that parents generally must provide children, the California legislature decided to "shield from liability those parents who provide prayer in lieu of medical care for their children" (A7), by stating that parents have provided necessary care if they provide "treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner thereof" (§ 270). To be sure, under the novel statutory interpretation pioneered by the court below, if the child of a parent following this invitation becomes extremely ill or dies, the parent is open to prosecution for felony child endangerment under § 273a(1) or involuntary manslaughter under § 192(b). But the jury question then becomes whether a "reasonable person" in those circumstances would have given up on God and summoned a doctor when the child for whom she had prayed in accord with § 270 continued to languish.

Because of § 270's partial accommodation, the circumstances to which the state's objective reasonableness test must be applied will necessarily be bound up with the reasonableness and truth of the religious beliefs that prompted the parent to *continue* to act under the sanction of § 270 rather than to abandon her faith and turn to medicine. For if the parent pointed out to the jury that prayer was presumptively reasonable under § 270, at least at the outset, and further convinced the

jury that prayer continued to be reasonable even as the child's condition worsened, and in fact was as effective as medical care might have been, the jury would have to acquit her of any violation of California's criminal law.

The Attorney General is thus flatly wrong in saying that the question is "whether, religious convictions aside" (Opp. 8), the parent's decisions were reasonable. For the California legislature expressly made the efficacy and reasonableness of a defendant's choice for prayer in lieu of medical treatment *directly relevant* in this situation. And it is beyond dispute that a defendant has a *right* to "present [her] version of the facts . . . to the jury so it may decide where the truth lies," *Washington* v. *Texas*, 388 U.S. 14, 19 (1967) — a right that is "a fundamental element of due process of law." *Id.* Even though "[f]ew rights are more fundamental," *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973), than the right to adduce in one's defense the logically material arguments and evidence that one chooses to adduce, the Attorney General proposes that people like petitioner simply give up this right as a condition of preventing a jury from investigating their religious beliefs.

The Attorney General has thus conceded that, if this trial is to go forward, petitioner would have to choose between undergoing a trial of her religious beliefs, and submitting to punishment without presenting a defense that the state's own statutes make logically relevant — the same kind of choice put to Anne Hutchinson and Roger Williams, and one danger the Free Exercise Clause was adopted to prevent. But such "a choice between the rock and the whirlpool" is "[i]n reality . . . no choice at all." *Frost* v. *Railroad Comm'n*, 271 U.S. 583, 593 (1926). For it is settled that government may not demand "that one constitutional right should have to be surrendered in order to assert another." *Simmons* v. *United States*, 390 U.S. 377, 394 (1968).

2. Nor does the Attorney General offer any meaningful response to petitioner's further argument that the judgment below conflicts with this Court's "fair warning" jurisprudence. Instead, the Attorney General merely argues that California's statutes *may* rationally be read so as to warn persons in petitioner's position that, if they rely on spirtual healing as § 270 tells them they are free to do, they act at their peril. Petitioner has never denied that this is a *possible* reading — noting only that, in this sensitive area, greater clarity is mandated. The Attorney General's basic response is that reduced tolerance for ambiguity is inappropriate because § 270 "*encourages* . . . religious practices." (Opp. 19 (emphasis added).) But that is the very problem to which the petition in this case points: California has invited its citizens to act in accord with the dictates of their faith — and then submit to trials focused on how reasonable they were in doing so. It is this very invitation that entails First Amendment dangers compelling closer scrutiny of problematic ambiguity than the court below accorded.

The Attorney General's second response is that petitioner *must* have been on notice of possible prosecution because she removed her ill daughter from the family home soon after her sister threatened to call the police. (Opp. 4, 18, 22.) But that merely restates the obvious — that the state's laws are *susceptible* to a reading that makes petitioner's guilt or innocence turn on whether police, prosecutors, and jurors find her faith unreasonable.

The Attorney General's third and final response on the issue of fair warning is that the 1976 amendment to § 270 did not give a fatally conflicting signal to people in petitioner's position because § 270 was *not* "the only law used by California for the last hundred years to prosecute parents for religiously-motivated failure to furnish medical care to their children." (Opp. 12 (quoting Pet. 3).) But in support of this thesis the Attorney General mysteriously cites only the very prosecution under

§ 270 that triggered the 1976 amendment (*People* v. *Arnold*) and a 1974 prosecution (of Alice and Wesley Parker) obviously predating that amendment, which *also* relied in part on § 270, which in any event resulted in no reported decision, which led to no ruling on appeal, and in which all charges against the parents were in the end set aside.[3] How this history even begins to meet petitioner's notice argument is, to say the least, unclear.

3. The Attorney General asserts that petitioner's claims are "premature" because she "has yet to be convicted of any offense" and "has yet to be brought to trial." (Opp. 9-10.) The latter assertion is particulary striking in its observation that a bill is pending before the state legislature that would, if adopted, statutorily overturn the *Walker* decision and bar the prosecution of petitioner and of others similarly situated. Apart from the incongruity of allowing a state to make such a "potential mootness" claim before review is even granted, the Attorney General makes no comment about the bill's obviously dim chance for passage. Moreover, the day after the Attorney General filed his brief in opposition in this case, he wrote a number of legislators urging that the pending bill be defeated as inconsistent with the state's policy of protecting children.[4] Finally, given California's choice of quasi-accommodation, there is no point in awaiting the outcome of a trial: trying petitioner would itself guarantee that her constitutional rights would be violated — inasmuch as she would be compelled to choose between abandoning a defense made logically relevant by the 1976 amendment to § 270, and sacrificing the right not to submit to a jury the reasonableness of her religious beliefs.

---

[3] *See* remittitur and order dismissing appeal, Lawrence and Alice Parker, 4 CRIM. 7210, dated 3/20/75 and 4/25/75, respectively; Minute Order, Case No. 29556, dated 6/23/78.

[4] *See, e.g.*, Letter from John K. Van de Kamp to Assemblymen Bates and Harris, May 26, 1989 (five pages).

4. The Attorney General's suggestion that this case appears to affect "only five people on the face of the earth" (Opp. 10) — Laurie Walker and four other similarly situated California defendants — blatantly ignores the wide implications of the decision below for religious freedom and fair trial in America. That suggestion ignores the several other states in which similar prosecutions are pending, *see supra* note 1, in one of which the opinion of the court below has been closely followed, *see supra* note 2. And the puzzling notion that the supposed "mere handful of prospective beneficiaries" of a decision by this Court should be relegated to a habeas corpus remedy (Pet. 11) sheds no light at all on whether the *legal issues* presented here are sufficiently weighty to merit plenary review by this Court, and presupposes a preference for habeas corpus that conflicts with the jurisprudence of the past two decades.

5. If this Court were to deny review despite the Attorney General's candid insistence on pursuing a quasi-accommodation theory and despite the other cases throughout the country where this issue is immediately relevant, there will remain on the books a conspicuous precedent that will unsettle the law of religious accommodation in ways previously unimaginable. When this Court has previously upheld a state's flat refusal to accommodate religious belief, it has never hinted that an acceptable alternative might have been a *partial* accommodation in which defendants were invited to put their religious beliefs on trial before secular juries. No one would doubt, for example, that Massachusetts could not subject the religious pamphleteers in *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), to a rule *allowing* them to use children to distribute leaflets on the streets — but only if jurors found reasonable the religious belief directing such child labor. And when this Court has previously upheld a governmental decision to accommodate religious belief by granting blanket dispensations to religious groups (for their non-profit, secular activities as well as for their religious activ-

ities), it has been apparent that a narrower, partial accommodation — one which would require a case-by-case examination of which activities were reasonably seen as religious — would be constitutionally problematic. *See, e.g., Corporation of the Presiding Bishop* v. *Amos*, 107 S. Ct. 2862, 2872-73 (1987) (Brennan, J., concurring).

Conclusion

What in the past has been implicit can, through review of this case, be made explicit: that in attempting to be responsive to religious groups while satisfying important secular policies, government may not simply split the difference by *appearing* to accommodate religious belief, but doing so only in a partial way that, if a fair trial is to be held, requires subsequent examination of the reasonableness of the religious beliefs at issue. If this Court accepts review and reverses, it would not be imposing constitutional values on democratically elected majorities. It would instead be enhancing the political process by ensuring that the people's elected representatives make clear choices on matters of religious accommodation rather than seeking to have it both ways and, in the process, trampling basic constitutional rights.

Respectfully submitted,

LAURENCE H. TRIBE
Counsel of Record
KENNETH J. CHESEBRO
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

Of Counsel:

THOMAS A. VOLK
ROBERT G. SCOFIELD
1721 Second Street
Sacramento, California

June 6, 1989